AAA Cab Services, Inc. *and* Independent Taxi Drivers Union, Petitioner. Case 28–RC–6154

March 17, 2004

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH AND MEISBURG

On May 28, 2003, the Board granted the Petitioner's request for review of the Regional Director's Decision and Order (pertinent portions of which are attached as an appendix), in which he found that the Employer's taxi drivers are independent contractors, not statutory employees, and thus, dismissed the petition.

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, we affirm the Regional Director's decision.

ORDER

The Regional Director's Decision and Order is affirmed.

Dated, Washington, D.C. March 17, 2004

Robert J. Battista, Chairman

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

Independent Taxi Drivers Union (Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent all full-time and part-time taxi drivers employed by AAA Cab Services, Inc. (the Employer) at its Tucson, Arizona facility, excluding all other employees, office clerical employees, guards, professional employees, and supervisors as defined in the Act. The Employer contends that the petition should be dismissed because taxi drivers are independent contractors and not statutory employees within the meaning of Section 2(3) of the Act. The Petitioner contends that the drivers are statutory employees. As discussed below, I have concluded that the taxi drivers in the petitioned-for unit are independent contractors and not employees, where, among other things, there is no relation between the Employer's compensation and the amount of fares collected by taxi drivers and the Employer exercises little control over the manner and means by which taxi drivers conduct business after they leave the Employer's facility. Accordingly, I will dismiss the petition.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. On the entire record in this proceeding, I find:

1. *Hearing and Procedures*: The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. *Jurisdiction and Employer Status*: The record evidence establishes that the Employer, an Arizona corporation, maintains offices and a places of business in Phoenix and Tucson, Arizona, where it is engaged in operation of a taxicab service for the general public as well as wheelchair disability van service for insurance companies and governmental entities. During the 12 months preceding the date of the hearing, the Employer purchased gasoline valued in excess of $200,000 from suppliers located within the State of Arizona. This gasoline was, in turn, transported from refineries outside the State of Arizona directly to said gasoline suppliers. During the same period, the Employer derived gross revenues in excess of $500,000 from its business operations. The Employer is engaged in commerce within the meaning of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. *Claim of Representation*: The Petitioner claims to represent the Tucson area taxicab drivers employed by the Employer. The Employer maintains that the Petitioner is not a labor organization as the only persons represented by the Petitioner are independent contractors. As I have found that the bargaining unit petitioned-for consists of only independent contractors, I need not decide the issue of whether the Petitioner would qualify as a labor organization within the meaning of Section 2(5) of the Act if the individuals that the Petitioner seeks to represent were found to be employees rather than independent contractors.

4. *Statutory Question*: As more fully set forth below, no question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

A. The Employer's Operations

The Employer has been engaged in providing taxicab and related services in the Phoenix, Arizona metropolitan area for approximately 20 years. In November 2002, the Employer entered the Tucson market by purchasing certain assets from Arnett Transportation, an entity which had been engaged in providing taxi services in the Tucson metropolitan area for many years.

The Employer bases its Tucson operations at one central location. Lyle Wamsley, the Tucson manager, oversees the Employer's day-to-day operations at this location. Below Wamsley is Gus Napier, Tucson fleet and risk manager; Xenia

Thornton, call center manager; Gilberto Fernandez, shop supervisor; and Eric Weinerschkirch, dispatch supervisor. Napier's job involves interacting with the Employer's insurer and investigating accidents. Thornton oversees the 35 "call-takers" employed by the Employer in Tucson. Call-takers are the people who answer telephone calls requesting taxi service and type the requests into the computerized dispatch system. Fernandez oversees the nine mechanics employed by the Employer. These mechanics perform both preventative maintenance and repair work on Employer vehicles. Weinerschkirch oversees five dispatchers, who monitor the dispatch computers to make sure that there are no problems. The Employer also employs five cashiers at its Tucson facility, who are supervised directly by Wamsley. The cashiers receive lease payments from taxi drivers and cash credit card and voucher fares received by drivers.[1]

The Employer operates a fleet of 110 taxicabs from its Tucson facility, of which 70 of these cabs operate under the Yellow trade name; 35 under the Courier trade name; 3 under the Checker trade name; and 2 under the Fiesta trade name. These cabs are painted according to the trade name under which they operate. The Employer owns 104 of these cabs, and owner/operators own the other 6. Every cab contains a computer dispatch system with a video display terminal, a meter, and a 2-way radio. This equipment is paid for, and remains the property of the Employer. At any given time, about 80 to 90 of the Employer's Tucson cabs are in operation.

The record reveals that there are a total of approximately 117 taxi drivers who operate the Employer's Tucson cabs. Taxi drivers operate these vehicles pursuant to 12-hour, 24-hour, or weekly lease arrangements with the Employer. As part of these lease arrangements, drivers must enter into the following agreements: a Master Independent Contractor Agreement (MICA); a Master Motor Vehicle Lease Agreement (MVLA); and a Master Communications Service Agreement (MCSA).

The MICA grants taxi drivers a license to use the Employer's trade names, and provides coverage under the Employer's common carrier liability insurance policy. The MICA also provides:

> Contractor agrees to comply with and abide by all laws, ordinances, rules and regulations of federal, state, county, municipal or other governmental authorities in connection with the operation of Contractor's Vehicle and in connection with the operation of Contractor's business of operating a vehicle for hire as a taxi cab.
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> . . . .
>
> 1. By this agreement, Company and Contractor expressly intend, acknowledge and agree that no relationship of employer-employee, principal-agent, or master-servant, either expressed or implied, shall exist, be created, inferred or result from this Agreement and that the relationship of the parties hereto is solely that of Independent Contractor and Company. Contractor shall be and remain free from any direction, interference or control by Company in the operation of Contractor's business of operating a vehicle for hire as a taxicab and in the operation of all vehicles so [sic]. Contractor agrees that he/she will comply with all applicable federal, state, municipal laws, ordinances, statutes, airport rules and regulations and that he/she will be solely responsible for any fines, penalties, or forfeitures occasioned by any violation thereof.
>
> 2. Contractor acknowledges:
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> a. Company will not furnish to Contractor or Contractor's drivers, workers' compensation insurance coverage. Should Contractor desire Workers' Compensation insurance or Contractor requires such insurance coverage, Contractor shall be solely responsible for and shall obtain such coverage at no expense to Company and provide evidence thereof to Company.
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> b. Contractor and Contractor employees are not eligible for federal or state unemployment benefits, chargeable to Company.
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> c. Contractor shall be solely liable for payment of all contributions required under Federal Insurance Contributions Act, resulting or to result from the operation of Contractor's business of operating a vehicle for hire as a taxi cab.
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> d. Contractor is solely responsible for withholding and the payment of federal and state income taxes, if any, and any other taxes or charges resulting from or to result from the operations of Contractor's business of operating a vehicle for hire as a taxicab.
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> 3. It is expressly understood and agreed between the parties hereto that Contractor will exercise sole and complete discretion in the operation of Contractor's vehicle and in the performance of those duties generally recognized as part of performing the transportation of passengers and property for hire, including without limitation:
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> a. Contractor is not required to account for the amount of fares collected from passengers or customers and is not required to share any fares and fees with Company.
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> b. Company shall have no right to restrict nor shall Contractor be restricted by Company as to the geographical area in, or hours of operation during, which Contractor operates his business of operating a vehicle for hire as a taxi cab.
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> c. Contractor shall not be required to remain at any specified location.
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> d. Contractor acknowledges and agrees that any persons driving vehicles covered under this agreement must adhere to all Municipal, State, and Federal regulations covering drivers for hire and all provisions of this agreement. Contractor further agrees that prior to permitting any person to drive a vehicle covered under this agreement to check driving records, drivers licenses and has [sic] all

[1] At the hearing, the parties stipulated, and I find based on the record as a whole, that Wamsley, Napier, Thornton, Fernandez, and Weinerschkirch are supervisors within the meaning of Sec. 2(11) of the Act because they direct the work of other employees. The parties also stipulated, and I find based on the record as a whole, that the Employer's call-takers, dispatchers, mechanics, and cashiers do not share a community of interest with taxicab drivers where, among other factors, they work different schedules, are compensated differently, have different benefit packages, have different supervision, and have little or no contact with each other.

other qualifications to operate a taxi cab for hire, so as not to disrupt the Company's business, damage the Company's image, or cause cost increases to the Company.

The Employer has approximately 180 MICAs on file.

As part of the leasing process, taxi drivers must fill out an application form that requests information, including personal references and work history. Drivers must also show that they are at least 25 years old; have a valid Arizona driver's license; have no more than two moving violations in the previous 39 months; and do not have a "driving under the influence" conviction. Drivers must also complete a 2-day driver training course, which covers such items as how the dispatch system works and defensive driving. There is no charge for this course.

The MVLA provides that the Employer will provide a vehicle equipped with a meter, dispatch equipment, signs, and other equipment to the taxi driver at a set rate per 12-hour, 24-hour, or weekly period. Currently, the 12-hour lease rate for a single driver is $70, the 24-hour lease rate is $105, and the weekly rate is $510. The MVLA expressly provides that the driver may enter into agreements with third parties to use their trade names and dispatching services. If two drivers team up to use the same vehicle over a 24-hour or weekly period, the lease rates are slightly higher.

In addition to the cost of the lease, drivers are responsible for the cost of fueling the vehicle and any other expenses they incur, such as workers' compensation insurance, medical insurance, business cards, cell phones, and pagers. Drivers may lose money if these costs exceed the fares and tips they take in, which they keep for themselves. They do not report their fares or tips to the Employer, and the Employer does not receive any percentage of the drivers' take. The Employer does not pay wages to any of the drivers, and the drivers are responsible for withholding and other taxes.

Under the MCSA, the Employer agrees to provide dispatch services "for use by Contractor in Contractor's sole discretion." The dispatch system utilized by the Employer is a computer-based system in which employees of the Employer, known as call-takers, receive telephone requests for taxi services and enter the request into the system. This system automatically selects an appropriate driver and causes basic information concerning the location of the fare to be displayed on a video terminal in the driver's vehicle. Absent special circumstances, drivers do not communicate with dispatchers or call-takers during the dispatch process. The driver may reject a call by pressing a button on the display. The driver may reject a call for any reason without penalty. If a call is rejected, the computer repeats the process with other drivers until someone accepts the call by pressing an accept button on the display. Once a driver accepts a call, additional information is displayed on the video terminal, including the form of payment. At this point, with limited exceptions relating to safety, that driver is required to service the call, regardless of where it is, where it is going, or what type of service is involved. Drivers who accept a call, and then fail to service it, are subject to a $5 fine imposed by the Employer.

There are a number of government-imposed rules and regulations applicable to common carriers, including that vehicles must be equipped with a meter and have posted, on the side of all cabs, base rates, wait-time rates, and other charges. If drivers accept a dispatch call, they must honor these rates, which are set by the Employer. The Employer also has contracts with the Veterans Administration and several insurance companies to provide transportation for certain individuals at substantially reduced rates. Individuals covered by these contracts do not pay cash. Instead, they provide a voucher to the driver. The driver presents this voucher to the Employer's cashier, who either applies the reduced rate fare to the driver's lease payment or provides the driver with cash. Before January 6, 2003, the initial dispatch displayed on the drivers' video display terminals disclosed whether a call was a voucher fare. On January 6, however, the Employer ceased displaying this information until after drivers accepted the dispatch, at which point drivers could no longer reject the dispatch. The record establishes that the Employer generates little, if any, revenue for itself as a result of its voucher contracts. The record evidence indicates that the voucher contracts are intended to inure to the drivers' benefit by providing a consistent stream of business.

In addition to being free to accept or decline Employer dispatches, drivers have substantial latitude in deciding how they operate their cabs. They are not restricted or assigned to any particular geographic area. Rather, they are free to work wherever they want. Thus, for example, they may remain parked at a single location as long as they wish, such as the bus station or a hotel, or they may drive around any part of the city seeking work. Similarly, drivers may set their own days and hours of work. The record reflects that, in some instances, drivers lease vehicles on a weekly basis, but choose not to work one or more of those days. Drivers are also allowed to sublease their vehicles to other drivers, provided that the other drivers have signed a MICA to ensure insurance coverage and meet the driver qualifications described above. Drivers are not required to wear any particular clothing or attire with the Employer's logo; on the contrary, they may dress as they please. Drivers may also use their leased vehicles for personal business or pleasure.

With respect to fares not obtained through dispatch, drivers are free to set their own rates. For example, drivers who are flagged down may agree to charge the rider a flat rate instead of using the meter. It is also not uncommon for drivers to have private clientele, who will contact the drivers via cell phone or pagers, and for drivers to charge these riders different rates.

The Employer does not have in place any handbooks, policy manuals, or rules of conduct for taxi drivers. However, the Employer may occasionally receive customer complaints about a driver, in which case the Employer will address those complaints with the driver. The Employer will terminate the lease agreement of a driver who is the subject of repeated complaints. The Employer has terminated the leases of 10 drivers who were involved in at-fault accidents because the Employer's common carrier liability insurer declared them uninsurable. However, these drivers remained eligible to work as independent contractors if they obtained their own liability insurance.

B. Legal Analysis and Determination

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The United States Supreme Court in *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968), observed that Congress did not define "independent contractor" in the Act, but intended that the issue should be determined by the application of general agency principles in each case. According to the Court, "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." Id. at 258. The Court further stated that there is no "shorthand formula" or "magic phrase" associated with the common-law test. Id.

In *Roadway Package System*, 326 NLRB 842, 850 (1998), the Board reaffirmed that the common law test of agency determines an individual's status as an employee or independent contractor. While acknowledging that the common-law agency test "ultimately assesses the amount or degree of control exercised by an employing entity over an individual," the Board in *Roadway* rejected the proposition that those factors that do not include the concept of "control" are insignificant when compared to those that do. Id. at 850. Among the factors considered significant at common law in determining whether an employment relationship exists, according to the Board in *Standard Oil Co.*, 230 NLRB 967, 968 (1977), are:

> (1) whether individuals perform functions that are an essential part of the [employer's] normal operation or operate an independent business;
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> (2) whether they have permanent working arrangement with the [employer] which will ordinarily continue as long as performance is satisfactory;
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> (3) whether they do business in the [employer's] name with assistance and guidance from the [employer's] personnel and ordinarily sell only the [employer's] products;
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> (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the [employer];
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> (5) whether they account to the [employer] . . . ;
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> (6) whether particular skills are required for the operations subject to the contract;
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> (7) whether they have a proprietary interest in the work in which they are engaged; and
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> (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman [that] may result in profit or loss.

In the context of the taxicab industry, the Board has given significant weight to two factors: "the lack of any relationship between the company's compensation and the amount of fares collected," and "the company's lack of control over the manner and means by which the drivers conducted business after leaving the [company's] garage." *Elite Limousine Plus*, 324 NLRB 992, 1001 (1997); *City Cab Co. of Orlando*, 285 NLRB 1191, 1193 (1987), citing *Air Transit*, 271 NLRB 1108 (1984), and *Checker Cab Co.*, 273 NLRB 1492 (1985).

These two factors militate toward a finding that the Employer's drivers are independent contractors. First, with respect to compensation, the record establishes that no relation exists between the Employer's compensation and the fares collected by drivers. On the contrary, drivers retain all of their fares and tips and do not provide any accounting to the Employer. The Employer's primary source of revenue is derived from the drivers' lease payments, which do not vary according to the amounts they earn.

Second, with respect to control over the operations of the cabs, the record amply demonstrates that the Employer lacks any significant control over the drivers once they leave the Employer's facility. In particular, drivers are free to decide what days and hours, if any, they work; the geographical area in which they work; how they dress; and whether to ignore all dispatch calls and instead rely on personal business and customers who flag them down on the street. Drivers are also allowed to set their own rates, including flat rates, for business not received through the Employer's dispatch system. There is likewise no prohibition against their working for other taxicab companies.

Control over the drivers is not demonstrated by the fact that the Employer sets standardized lease terms in its leasing agreements. Rather, this is indicative only of the parties' relative bargaining power and "is irrelevant to the issue of control in determining the status of drivers regarding whether they are employees or independent contractors." *City Cab Co. of Orlando*, supra, citing *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978); and *NLRB v. Associated Diamond Cabs*, 702 F.2d 912 (11th Cir. 1983). Likewise, the fact that the Employer, in accordance with state law, establishes meter rates, which are posted on the sides of its cabs, does not establish that the Employer exercises any significant control over the drivers. The Board has held that governmentally imposed rules such as those associated with the posting of fares do not evince the level of control by an employer to preclude independent contractor status. *Associated Diamond Cabs*, supra; *Elite Limousine Plus*, supra; *Precision Bulk Transport*, 279 NLRB 437 (1986); *Don Bass Trucking*, 275 NLRB 1172 (1985). Moreover, the Employer's requirement that drivers service a dispatch once they accept it, does not preclude the finding of independent contractor status. In *Checker Cab Co.* at 1493, the Board held that company-devised rules "obligat[ing drivers] to serve a fare once it is accepted" relate primarily to the orderly dispatch of taxicabs and are not significant factors regarding independent contractor status. Finally, the Employer's ability to counsel drivers and terminate their leases based on customer complaints does not establish control sufficient to show an employer-employee relationship. In *City Cab Co. of Orlando*, at 1194, the Board held that actions such as these designed to preserve customer goodwill and trade name value were not incompatible with a finding of independent contractor status for the drivers.

Other factors also support my conclusion that the drivers in this case are independent contractors. First, although the drivers may never acquire title to the cabs they drive, they nonetheless have a significant proprietary investment in the instrumentalities of their work. The Board has held that paying lease or rental fees over a period of time results in a substantial investment on the part of a lessee. *City Cab Co. of Orlando*, at 1194.

Second, the drivers in this case have the opportunity to make decisions involving risks that may result in profit or loss. The Employer does not guarantee drivers any level of income. Instead, drivers make a myriad of decisions, including when and where they should work, whether to use the dispatch service and to what extent, what rates they should charge non-dispatch riders, and whether to sublease their vehicles. Based on their decisions and execution, drivers may operate at a profit or a loss. Third, the Employer does not pay any wages to the drivers, and the drivers are responsible for paying their own withholding and other taxes. Drivers do not account to the Employer. Fourth, the Employer does not require drivers to keep any records of the fares or tips they receive. Instead, its only interest is that drivers remain current on their lease payments.

Consequently, the drivers in this case are distinguishable from drivers such as those in *Stamford Taxi*, 332 NLRB 1372 (2000), who were found to be statutory employees. In contrast to the Employer's taxi drivers, in *Stamford Taxi*, drivers were subject to a commission-based system, so that the employer's revenues were directly correlated to the amount of fares collected by the drivers. The employer exerted significant control over the drivers' terms and conditions of employment by, among other things, prohibiting drivers from operating their vehicles independently or for third parties; retaining title to all of its vehicles; prohibiting use of its vehicles for personal use; implementing comprehensive rules of conduct and dress codes; requiring drivers to use its dispatch system; and imposing an elaborate and regular reporting procedure. None of these factors is present here.

Based on the foregoing, I find that the taxi drivers in the petitioned-for unit are independent contractors and not employees within the meaning of Section 2(3) of the Act. In these circumstances, I shall dismiss the petition.